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Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

No. 97-573

In The

Supreme Court of the United States

October Term, 1997

RONALD KIDD and THOMAS HAMPTON, on behalf of others similarly situated,

Petitioners,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Eleventh Circuit commit error when it held that the law of the case doctrine prevented it from deciding again precisely the same issue an earlier panel had decided three years earlier, when the law and the facts had not changed?

LIST OF PARTIES

Petitioners are Ronald Kidd and Thomas Hampton.

Respondent is The Equitable Life Assurance Society of the United States.

STATEMENT PURSUANT TO RULE 29.6

Respondent lists the following parent companies and nonwholly owned subsidiaries: The Equitable Companies Incorporated (parent company).

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STATEMENT OF THE CASE

There are no appropriate grounds for granting a writ of certiorari in this case. Petitioners are asking this Court to review a straightforward application of the law of the case doctrine by the Eleventh Circuit. The case turns on its own facts. No questions of national importance are presented, and there is no conflict among the lower courts. There also is no error in the lower court's decision. The Eleventh Circuit simply declined to decide again precisely the same question it already had decided once, on a prior appeal three years ago involving these same parties in this same case, because there had been no change in the law or the facts.

In both appeals, *Kidd I* and *Kidd II*,[1] the Petitioners brought the same question before the Eleventh Circuit — whether they were required to arbitrate their alleged employment discrimination dispute with their employer pursuant to the National Association of Securities Dealers ("NASD") arbitration procedures to which they had contractually agreed in their securities industry "U-4" registration statements. In both appeals, Petitioners raised the same contention in an attempt to avoid their commitment to arbitrate rather than litigate — that arbitration could not be required because they had filed their lawsuit as alleged representatives of a putative Rule 23 class, and Section 12(d) of the NASD Code of Arbitration Procedure excluded class claims from arbitration. *See* NASD Manual (CCH) Rule 10301(d)(3) (1997) ("Section 12(d)"). The Eleventh Circuit explicitly considered and rejected this defense in the

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1. The Eleventh Circuit's first decision in the case was issued on September 16, 1994. *See Kidd v. Equitable Life Assurance Soc'y of Am.*, 32 F.3d 516 (11th Cir. 1994) (hereinafter "*Kidd I*"). The Eleventh Circuit's second decision was issued on June 30, 1997 and is unreported. *See Kidd v. Equitable Life Assurance Soc'y of Am.*, No. 96-6812 (11th Cir. June 30, 1997) (table decision at 119 F.3d 11) (hereinafter "*Kidd II*").

first appeal: "[W]e reject [Petitioners'] claims that arbitration should not be required because . . . § 12(d) of the amended Code precludes arbitration of their disputes. . . ." *Kidd I*, 32 F.3d at 518 n.4.

Nevertheless, despite this explicit rejection, Petitioners returned to the Eleventh Circuit a second time to raise the exact same issue. In *Kidd II*, Petitioners claimed that the law of the case established in the first appeal was not dispositive because two things had happened: (1) the NASD had clarified, through an administrative Rule Change, that Section 12(d) prevented the arbitration of class claims, just as Petitioners had argued in *Kidd I*; and (2) the NASD apparently had rejected Petitioners' demand for arbitration of their claims in a class action format, just as Petitioners had predicted in *Kidd I*.

The *Kidd II* panel declined to reconsider Petitioners' arguments, holding that it was precluded from deciding the exact same issue a second time:

> **The law of the case established in *Kidd I* controls this appeal. None of the exceptions to the law of the case doctrine apply here. Neither the relevant law nor the facts has changed.**

Kidd II, slip. op. at 3 (emphasis added).

There was no error in this decision. The law had not changed between the two appeals; instead, the NASD simply had clarified Section 12(d)'s original intent, consistent with Petitioners' interpretation. The facts had not changed either; instead, the NASD apparently applied its procedures in the exact way Petitioners always had predicted.

MISSTATEMENTS OF FACTS AND LAW IN THE PETITION

Pursuant to Supreme Court Rule 15.2, Respondent identifies the following misstatements of fact and law in the Petition:

1. There are evidentiary defects and factual misstatements that impact the Court's ability to decide on the merits the questions presented in the Petition. Petitioners claim that, following the *Kidd I* decision in 1994, they submitted their claims to the NASD for arbitration on three different occasions, and that on each occasion the NASD refused to accept their claims due to Section 12(d). *See* Petition at 2-3. In the lower courts, however, these assertions were never supported by evidence in the record, and Petitioners now have compounded the record deficiencies by alleging new facts and including new non-record materials in their Petition in this Court.

Throughout the *Kidd II* proceedings, Petitioners' only proof of the purported submission and rejection of their arbitration demands consisted of two quotes from two alleged letters from the NASD, set forth within the body of their Motion to Reinstate. (Record 28 at 2-3.) The absence of any legitimate record evidence of these matters was brought to Petitioners' attention in May 1996 by counsel for Respondent, who had never been served with copies of the purported NASD arbitration claims. *See* Defendant's Memorandum in Opposition to Plaintiffs' Motion to Reinstate at 5 n.2. In response, Petitioners provided to counsel for Respondent a single, undated document entitled "Statement of Claim for Arbitration." *See* Respondent's *Kidd II* brief at 10 n.4. Petitioners did not verify and file either this "Statement of Claim" or any other with the court, nor did they verify and file any of the NASD letters quoted in the body of their Motion to Reinstate.

In their Petition to this Court, Petitioners exacerbate the record deficiencies by making brand new factual assertions and attaching to the Petition new "evidence" that has never been provided to Respondent or made a part of the record in this case. In their Motion to Reinstate in the district court, Petitioners asserted that the three alleged NASD rejections were dated November 15, 1995, December 17, 1995, and February 1, 1996. (Record 28 at 2-3.) In this Court, Petitioners now identify different dates for the purported NASD rejections, and attach a March 7, 1996 NASD letter that has never been identified, disclosed, or discussed in any way, at any time in this case. *See* Petition Appendix F at 22a.

Accordingly, for obvious reasons, Respondent reserves its right to challenge Petitioners' unsupported assertions regarding the NASD's purported treatment of their demands following *Kidd I*.

2. In their Petition, Petitioners have mischaracterized the NASD's April 20, 1994 clarification of Section 12(d) of the NASD Arbitration Code as a substantive change.[2] For example, Petitioners state that "at the time arbitration was compelled on remand, the version of Section 12(d) that was before [the Eleventh Circuit] in the last appeal was no longer in existence." Petition at 4. This assertion falsely implies that the NASD's clarification actually created some new rule, and that the NASD rule in effect during *Kidd I* was not in effect during *Kidd II*. To the contrary, both the NASD and the SEC stated that the additional language was added simply to clarify the "**original intent** of the section." 59 Fed. Reg. at 22033 (emphasis added). Thus, the same arbitration rules were in effect throughout this case, both in *Kidd I* and *Kidd II*.

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2. *See* Order Approving NASD Proposed Rule Change Relating to Exclusion of Class Action Claims from Arbitration, Exchange Act Release No. 33939, 59 Fed. Reg. 22032 (1994) (attached as Ex. D to Respondent's *Kidd II* brief).

3. Petitioners have included in their Petition false and wholly unsupported accusations regarding when Respondent allegedly became aware of the NASD rule clarification, which was published after submission of the *Kidd I* briefs but before the *Kidd I* oral arguments and decision. Specifically, Petitioners charge that Respondent "breached the duty to report to the court adverse changes in the law." Petition at 23. This is not true. Petitioners cite no evidence — because there is none — that Respondent or its attorneys had knowledge of the NASD clarification at any time prior to the oral argument or decision in *Kidd I*.[3]

REASONS FOR DENYING THE WRIT

The Petition should be denied because there is nothing certworthy in the Eleventh Circuit's *Kidd II* decision, which is a narrow holding based entirely on the law of the case doctrine. The decision is not in conflict with this Court's precedent, presents no conflict that exists among the lower courts, and involves no question of national importance.

The Petition also should be denied because the reasons put forward by Petitioners are decidedly insufficient. Petitioners essentially argue that a writ of certiorari should be granted for two reasons: (1) the Eleventh Circuit's *Kidd II* decision purportedly "rewrote" Petitioners' arbitration agreements by requiring them to submit their claims to arbitration even though the NASD did not allow arbitration of class claims; and (2) the Eleventh Circuit improperly applied the law of the case doctrine even though there were changed circumstances that would have allowed it to depart from its earlier decision. Petitioners' first argument is nothing more than an attempt to have this Court review *Kidd I*, which it cannot do. Petitioners had the opportunity

3. Notably, Petitioners also offer absolutely no explanation for why they did not bring the rule clarification to the court's attention.

to seek certiorari on those issues three years ago, which they declined to exercise. Petitioners' second argument fails because there was no error in the Eleventh Circuit's straightforward application of the law of the case doctrine in *Kidd II*. Thus, there is no sufficient basis for granting a writ of certiorari in this case.

I.

THERE IS NOTHING CERTWORTHY IN THE *KIDD II* DECISION.

Review by this Court is unwarranted and inappropriate because the *Kidd II* decision by the Eleventh Circuit involves no legal issue of any national import and turns on its own facts, and because the record deficiencies hamper the Court's ability to decide the questions presented on their merits. The brief decision by the Eleventh Circuit in *Kidd II* essentially consists of two holdings: (1) the issue before the second panel "was clearly before . . . the prior panel of this court," and therefore the "law of the case established in *Kidd I* controls this appeal," and (2) no exception to the law of the case doctrine was applicable because "[n]either the relevant law nor the facts has changed." *Kidd II*, slip. op. at 3 & n.1. Neither of these holdings conflict with any precedent of this Court. Neither of these holdings involves issues that are in conflict in the lower courts. Petitioners acknowledge as much in their Petition, wholly failing to identify any conflict between *Kidd II* and the decisions of this Court or the lower courts.

This case also turns on its own facts, and therefore any decision by this Court is unlikely to have an impact on any other case. The factual scenario that was before the Eleventh Circuit in *Kidd II* assuredly stands alone: Following the first panel's decision in *Kidd I*, Messrs. Kidd and Hampton deliberately submitted their claims to the NASD as the representatives of a

putative class, rather than individually, despite Section 12(d)'s exclusion of such claims from the arbitration forum and despite the first panel's express ruling that Section 12(d)'s exclusion did not relieve them of their contractual agreement to arbitrate. Petitioners identify no other persons — because it seems certain that none exist — who are involved in a similar situation who would benefit from a decision by this Court.

Review by this Court also is inappropriate due to the record deficiencies. As explained above, there is no evidence in the record to support Petitioners' assertions that they submitted their claims to the NASD on three occasions after the *Kidd I* decision, and that each time the NASD rejected the claims on the basis of Section 12(d). There also is the new problem created by the Petition itself. In Appendix F, Petitioners have attached a purported letter from the NASD that has **never** been previously disclosed or discussed in this case, at any time. *See* Petition at 22a. The purported letter is dated March 7, 1996, yet in *Kidd II* Petitioners asserted that the third and final rejection by the NASD occurred in a letter dated February 1, 1996. *See, e.g.*, Petitioners' *Kidd II* Reply Brief at 3 ("the NASD refused to arbitrate the plaintiffs' claims on three separate occasions — most recently on February 1, 1996"). Thus, even if there were a certworthy issue in the Eleventh Circuit's *Kidd II* decision, the deficient and uncertain state of the record provides independent grounds for not granting a writ of certiorari.

II.

THIS COURT CAN REVIEW ONLY *KIDD II*'S LAW OF THE CASE DECISION, NOT *KIDD I*'S ARBITRABILITY DECISION.

Petitioners' first argument for granting a writ of certiorari — that the Eleventh Circuit "rewrote" the arbitration agreement by requiring arbitration and refusing to reinstate their claims

even though the NASD arbitration rules did not allow for arbitration of class claims — is insufficient because it is based entirely on the first panel's decision in *Kidd I*, not the second panel's decision in *Kidd II*. It was in 1994, in *Kidd I*, that the Eleventh Circuit required Petitioners to submit their claims to arbitration. In *Kidd II*, the Eleventh Circuit merely held that reinstatement of Petitioners' claims was foreclosed by the law of the case, as established in *Kidd I*. Thus, the applicability of the law of case doctrine is the only question for which Petitioners can seek a writ of certiorari. The time to seek a writ based on the *Kidd I* arbitrability decision expired years ago, on December 15, 1994.

Petitioners attempt to mask their untimely petition by quoting the *Kidd II* decision in a misleading way. In the Petition, Petitioners describe the *Kidd II* decision as follows: "The panel opinion states, 'plaintiffs' employment contracts required them to arbitrate their claims.' *Kidd II*, slip op. at 2." Petition at 10. The portion of *Kidd II* quoted by Petitioners, however, is merely *Kidd II*'s recounting of the *Kidd I* decision. The full quotation makes this clear:

> On appeal, this court reversed the district court[,] holding[ ] that plaintiffs' employment contracts required them to arbitrate their claims. *Kidd v. Equitable Life Assurance Society*, 32 F.3d 516 (11th Cir. 1994) (*Kidd I*).

Kidd II, slip op. at 2.

In *Kidd II*, the Eleventh Circuit did not decide any of the arbitrability issues now urged by Petitioners as reasons for granting a writ, nor could it, due to the law of the case established in *Kidd I*. Accordingly, Petitioners' argument that the Eleventh Circuit misapplied or "rewrote" the terms of the NASD arbitration agreement is not properly before this Court, and their petition for a writ of certiorari therefore must be denied.

III.

THERE WAS NO ERROR IN THE DECISION IN *KIDD II* THAT REINSTATEMENT WAS BARRED DUE TO THE LAW OF THE CASE.

In *Kidd II*, the Eleventh Circuit correctly held that its prior decision in *Kidd I* barred reinstatement of Petitioners' claims. It did so because "[n]either the relevant law nor the facts has changed," and thus none of the exceptions to the law of the case doctrine was applicable. *Kidd II*, slip op. at 3. There was no error in this holding.

In *Kidd I*, the Eleventh Circuit expressly held that Petitioners were contractually bound by the NASD Code of Arbitration Procedures to arbitrate their disputes with Respondent, regardless of the effect of Section 12(d) on their attempt to assert those claims in a class action rather than in individual lawsuits. 32 F.3d at 518-19. Petitioners returned three years later and asked the *Kidd II* panel to decide the same question, despite the fact that the legal bases for the *Kidd I* decision had not changed at all. The only difference in the second appeal was Petitioners' factually unsupported allegation that the NASD had prevented them from arbitrating their claims in the form of a class action, rather than individually, pursuant to Section 12(d). This eventuality, however, was explicitly raised by Petitioners in *Kidd I*, and therefore did not constitute "new and substantially different evidence." *See Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1986); *see also infra* Section III.C. Accordingly, the *Kidd II* panel was precluded by the law of the case from deciding the issue differently.

A. The Law of the Case Doctrine Has Only Three Narrow Exceptions, None of Which Was Applicable in *Kidd II*.

The law of the case doctrine is well established in the Eleventh Circuit:

> [B]oth the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.

United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982). The court of appeals' decision "represents the law of the case not only as to matters decided explicitly but also as to those decided by necessary implication." *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir.), *modified on other grounds*, 997 F.2d 1340 (11th Cir. 1993). Only "the most cogent of reasons" will justify a failure to follow the earlier appellate decision. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974).

Only three narrow exceptions allow a court to act contrary to a prior appellate decision in the same case:

> (1) when new and substantially different evidence is presented subsequent to the appeal; (2) when controlling authority has been rendered, contrary to the law of the appellate decision; (3) when the prior decision was clearly erroneous and would work a manifest injustice if implemented.

Leggett v. Badger, 798 F.2d 1387, 1389 (11th Cir. 1986). The Eleventh Circuit has emphasized "the need to read and apply these exceptions narrowly." *Id.* at 1389 n.2. The prior appellate decision must be followed "unless the court is certain that one

of the three [exceptions] specifically and unquestionably applies." *Id.* In this case, none of the three narrow exceptions would have allowed the *Kidd II* panel to rule contrary to *Kidd I*.

B. There Was No "Change in Controlling Authority" Between *Kidd I* and *Kidd II*.

In *Kidd II*, Petitioners argued that the "controlling authority relied on by the Court in *Kidd I* has been changed," referring to the April 20, 1994 NASD clarification. *See* Petitioners' *Kidd II* Brief at 22. The *Kidd II* panel correctly concluded, however, that there had been no change in the relevant law. The court found it unnecessary to discuss its holding in any detail, but there are several obvious bases for such a finding.

First, as a matter of timing, the NASD clarification was not new authority that came after *Kidd I*. The NASD clarification was approved by the Securities and Exchange Commission ("SEC") on April 20, 1994, five months prior to *Kidd I*. The proposed clarification was first published even earlier, on January 24, 1994.[4] Accordingly, the clarification was not post-*Kidd I*.

Second, the NASD clarification was not a "change," it was a clarification of existing rules. This clarification worked no fundamental change in the NASD Code of Arbitration Procedures; it simply advised that Section 12(d) should be interpreted as a prohibition on the pursuit of class claims in the arbitration forum, both by investors and registered representatives, just as Petitioners had argued was the rule in *Kidd I*. Petitioners failed to persuade the *Kidd I* panel that such

4. *See* Proposed Rule Change by NASD Relating to Exclusion of Class Action Claims from Arbitration, Exchange Act Release No. 33506, 59 Fed. Reg. 4299 (1994) (attached as Ex. D to Respondent's *Kidd II* Brief).

a prohibition justified relieving them of their contractual obligation to arbitrate their claims, and the NASD rule clarification provided no basis for a contrary decision by a second panel three years later.

Finally, the NASD clarification did not rise to the level of new "controlling [legal] authority [that] compels a contrary decision of law." *Williams v. City of Dothan*, 818 F.2d 755, 758 (11th Cir. 1980), *modified*, 828 F.2d 13 (11th Cir. 1987). The standard for rejecting a prior appellate decision based on new authority is a demanding one: "The law of the case will be disregarded only when the court has a clear conviction of error with respect to a point of law on which its previous decision was predicated." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981). "[M]ere doubt on our part is not enough to open the point for full reconsideration." *Id.*

In *Kidd II*, Petitioners essentially offered nothing more than an additional citation for their previously proffered interpretation of Section 12(d). Using the NASD clarification, Petitioners were able to argue that their interpretation of the NASD Code of Procedures had been proven correct. At best, they were able to "make a more persuasive argument . . . than we would have thought likely when the case was last here," *Fogel*, 668 F.2d at 109, but their additional citation hardly meets the demanding standard that must be met for a court to rule contrary to a prior appellate decision in the same case.

Moreover, in any event, the *Kidd I* decision was not predicated on Section 12(d). Instead, it was predicated on a finding that the NASD procedures required the arbitration of employment-related disputes, and that those procedures were applicable to Petitioners. *See Kidd I*, 32 F.3d at 518-19. In *Kidd I*, the Eleventh Circuit disposed of Petitioners' Section 12(d)(3) argument in a footnote, without discussion: "[W]e reject

[Plaintiffs'] claims that arbitration should not be required because . . . § 12(d) of the amended Code precludes arbitration of their disputes. . . ." *Id.* at 518 n.4. The fact that Plaintiffs sought to assert their claims as the representatives of a putative class, rather than individually, and that Section 12(d) might not allow them to pursue their claims in that fashion, obviously were insufficient reasons for relieving Petitioners of their agreement to arbitrate. Thus, the NASD rule clarification, which tracked the argument already raised and rejected in *Kidd I*, could not be considered new "controlling" authority that compelled a contrary decision in *Kidd II*.

C. The *Kidd I* Mandate Did Not Leave Open the Question of Reinstatement in Federal Court After NASD Rejection of the Class Claims.

Petitioners devote much of their Petition to arguing that the mandate in *Kidd I* left open the possibility of reinstatement of their class claims in the district court after rejection by the NASD. *See* Petition at 16-22. Petitioners argue that the mandate was required to provide for such reinstatement, for constitutional reasons, because the question of post-rejection reinstatement was not "ripe" when *Kidd I* was decided. *Id.*

Petitioners' argument ignores the fact that, in *Kidd I*, they repeatedly argued to the Eleventh Circuit that their class claims would be rejected by the NASD pursuant to Section 12(d) because they were going to insist on proceeding in a class action format rather than individually. *See, e.g.*, Petitioners' *Kidd I* Brief at 27, 29, 49. In fact, Petitioners plainly advised the Eleventh Circuit that they intended to bring Section 12(d)'s prohibition on class claims into play and then seek reinstatement in the district court:

> It will make no sense to reverse the denial of arbitration and send this case to the NASD only to have it

> immediately removed back to the district court on the filing of a mere notice that plaintiffs "submit" their claims as a class action, thereby triggering the plain language of § 12(d)(1) of the NASD Code. Futile gestures are not required.

Id. at 28; *see also id.* at 29 ("the named plaintiffs will 'submit' their claims as a class action under Section 12(d)(1) if the motion to compel arbitration and stay proceedings is ever granted").[5]

Accordingly, it strains credulity to argue, as Petitioners now do, that the issue of post-rejection reinstatement was never adequately presented to the *Kidd I* panel. *See* Petition at 21. Petitioners gave full warning to the Eleventh Circuit of their deliberate tactical decision to submit their claims to the NASD as part of a class action, and of the virtual certainty that the NASD would refuse to permit them to be arbitrated in that format pursuant to Section 12(d). If the Eleventh Circuit had intended to advise Petitioners that reinstatement in the district court could be sought upon the NASD's rejection of such class action claims, it surely could have done so in its opinion. Instead, the court unequivocally stated: "[W]e reject [Petitioners'] claims that arbitration should not be required because . . . § 12(d) of the amended Code precludes arbitration of their disputes. . . ." *Kidd I*, 32 F.3d at 518 n.4. This opinion thus did not leave open the question of post-rejection reinstatement, whether on ripeness or any other grounds.

Both the district court and the Eleventh Circuit correctly recognized the finality of the *Kidd I* panel's decision. There is absolutely no reason for this Court to grant a writ of certiorari to review that very straightforward conclusion.

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5. Petitioners' unequivocal statements in *Kidd I* regarding their intention to submit their claims to the NASD in a class action format, despite Section 12(d)'s prohibition, are in direct conflict with their present ripeness argument, which they admit is a concept that "involves uncertain and contingent events that **may not occur**." Petition at 21 (emphasis added).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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